LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 6 1967
JOHN F. DAVIS, CLERK

No. 642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

GEORGE L. SAUNDERS, JR.
MILTON R. SCHROEDER
HOWARD J. TRIENENS
11 South LaSalle Street
Chicago, Illinois 60603

LLOYD N. CUTLER
900 17th Street N. W.
Washington, D. C. 20006

EDWARD K. WHEELER
Southern Building
Washington, D. C. 20006

Attorneys for Appellants

January 6, 1967

TWENTIETH CENTURY PRESS, INC., CHICAGO 60604

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

I. No Justification Has Been Shown For The Commission's Failure To Formulate, Before Permitting Consummation, The Essential Conditions To The Penn-Central Merger As Required By Section 5(2). 4

A. The Commission's Failure to Determine a Place for Railroads That Would be Destroyed by Penn-Central Threatens the Public Interest in a Competitive Eastern Rail Market. .. 5

1. The Commission's Failure to Condition the Penn-Central Merger so as to Protect other Eastern Railroads has not been Justified. 5

2. Commissioner Webb's Recommended Report in I.C.C. Finance Docket 21510 Illustrates the Serious Long-Term Repercussions Resulting from the Commission's Failure to Determine Essential Conditions to the Penn-Central Merger Prior to its Consummation. 12

B. The Commission's Failure to Determine Interim Protective Conditions for Railroads Threatened By the Penn-Central Merger Will Cause Irreparable Injury to Both the Protected Carriers and the Unprotected Carriers. 20

1. The Traffic Protective Conditions Do Not Purport to, and Cannot, Provide Adequate Protection. 23

2. "Indemnity" Conditions, Although Basic to the Commission's Protective Scheme, Are Illegal. 26

II. Immediate Consummation Of The Merger, As Conditioned, Would Serve No Public Interest And Simply Would Further A Plan To Assure Penn-Central Domination Of The Eastern Railroad Market 32

PAGE

A. Immediate Consummation of the Merger Would Produce Neither Savings to Penn-Central nor Benefits to the Public 33

B. The New Haven Situation Provides No Basis for Rushing Consummation of Penn-Central. 36

C. Penn and Central Seek Immediate Consummation of Their Merger to Achieve a Position of Dominance Over the Eastern Railroad Industry 41

Conclusion 46

Appendix A A-1

Appendix B B-1

Appendix C C-1

Appendix D D-1

INDEX TO CITATIONS

CASES:

Atlantic Coast Line R. Co. v. United States, 284 U.S. 288 (1932) 30

Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378 (1959) 10

Boston & Maine R. Pooling, etc. Application, 298 I.C.C. 703 (1956) 29

Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), aff'd, 375 U.S. 216 (1963) 8

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 43

Chicago & N.W. Ry. Co. v. Peoria & P.U. Ry. Co., 201 F. Supp. 241 (S.D. Ill. 1962), aff'd, 319 F.2d 117 (7th Cir. 1963), cert. denied, 375 U.S. 969 (1964) 29

FPC v. Idaho Power Co., 344 U.S. 17 (1952) 22

PAGE

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 10

Fifteen Per Cent Case, 179 I.C.C. 215 (1931) 29

Hennesey v. SEC, 285 F.2d 511 (3d Cir. 1961) 6

Kennedy v. Long Island Rail Road Co., 319 F.2d 366 (2d Cir. 1963), cert. denied, 375 U.S. 830 (1963) 28

New England Divisions, 261 U.S. 184 (1923) 10

New York Central Securities Co. v. United States, 287 U.S. 12 (1932) 9

New York Central Unification, 150 I.C.C. 278 (1929) .. 9

Norfolk & Western R. Co. and New York C. & St. L. R. Co.—Merger, 324 I.C.C. 1 (1964) 10

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert denied, 384 U.S. 941 (1966) 11

Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (1965) 18

SEC v. Drexel & Co., 348 U.S. 341 (1955) 10

United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499 (1935) 12

United States v. Von's Grocery Co., 384 U.S. 270 (1966) 43

Wilson & Co. v. United States, 335 F.2d 788 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965) 6

STATUTES:

Administrative Procedure Act
§ 7(c), 5 U.S.C. § 1006(c) 40

Interstate Commerce Comm'n
§ 1(16), 49 U.S.C. § 1(16) 30

§ 5(1), 49 U.S.C. § 5(1) 27, 29, 30, 31

§ 5(2), 49 U.S.C. § 5(2) ..... 3, *et. seq.*

§ 5(11), 49 U.S.C. § 5(11) 30

PAGE

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 43(b) 40

H. R. Rep. No. 1217, 76th Cong., 1st Sess. (1939) 29

Kaysen and Turner, Anti-Trust Policy: An Economic and Legal Analysis 42

5 Moore, Federal Practice 40

No. 642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et. al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS[1]

PRELIMINARY STATEMENT

None of the appellees denies that Penn and Central are already two of the largest railroads in the East and that their merger will create a single corporation having as much railroad business as all of its competitors put together. Nor does any appellee deny that the fusion of Penn and Central would send out shock waves that would destroy several of the smaller Eastern railroads and create serious problems for the others unless special protective conditions are attached to the merger pending a restructuring of the Eastern railroads outside Penn-Central. Despite the admitted necessity for imposition of special conditions before merger of Penn and Central can be in the public interest, no such conditions have as yet

[1] This reply brief is filed on behalf of the appellants in No. 642 other than CNJ. Appellant CNJ, while concurring in the points made by the other appellants in this reply brief, is filing a separate reply brief dealing with matters of special importance to it.

been determined by the Commission. For that matter, no appellee is able even to suggest to this Court the nature of either the long-range conditions under which Penn-Central would be consistent with the public interest or the interim conditions which might be imposed pending the determination of the fate of the other Eastern railroads.

Yet all appellees[2] urge that the irrevocable consummation of Penn-Central be permitted to take place immediately. What is the urgency for consummation of Penn-Central, which will create such problems for the other Eastern railroads, before the necessary solution to the problems of these railroads has been found, and before the terms for interim protective conditions have even been drafted? No appellee even suggests that immediate consummation can be justified today as necessary to the survival of Penn or Central. The only grounds for immediate consummation advanced by appellees are that the merger will produce desirable operating efficiencies and will provide a basis for saving the New Haven and that, if the merger falls apart, these benefits will be lost. As we shall show in this reply, there is no basis for believing that there will be any improvements in efficiency during the period the merger would be subject to interim protective conditions. Nor is there any basis for believing that delay in consummation of Penn-Central will affect the New Haven, which could not be included in Penn-Central for some time in any event. And the notion that Penn and Central will walk away from their merger agreement is fanciful. If the merger is that fragile, it cannot be as desirable for the stockholders of those railroads as everyone has been led to believe.

Thus, there is no basis for the Commission's order permitting consummation of Penn-Central before it has sat-

[2] Not including, of course, the United States which is aligned with appellants in this Court.

isfied the requirement of Section 5(2) of the Interstate Commerce Act that the essential terms and conditions of a merger transaction be determined before that merger, as conditioned, can be found to be consistent with the public interest.

Appellees assert generally that the Commission's finding that the Penn-Central merger will be "consistent with the public interest" under Section 5(2) is not challenged by any of the appellant railroads (*e.g.*, ICC Brief, p. 42). This is not so. Until the Commission completes its function under Section 5(2) and determines how and to what extent Penn-Central is to be conditioned, the Commission cannot know whether Penn-Central, as conditioned, is or is not consistent with the public interest. As stated in our opening brief (p. 25), "the Penn-Central merger cannot be found to be in the public interest unless and until the other railroads serving the East can be so restructured or otherwise protected that their ability to compete against the large Penn-Central system is assured." Since this has not yet been done, the Penn-Central merger, as presently conditioned, cannot be found to be consistent with the public interest within the meaning of Section 5(2), and the appellant railroads have never conceded that it could be so found.

Nothing in the position of the "agencies of the Executive Branch," repeatedly cited by appellees (ICC Brief, pp. 37, 42, 72; P-C Brief, pp. 19, 50), is at all inconsistent with the position of appellants. As specifically stated in the Memorandum of the Department of Justice (p. 22):

> "This view [of the agencies] expressly assumes, however, that a place in the emerging pattern of consolidation in the Northeast can be found for the lesser roads of the region. Indeed, an important reason why consolidation is supported is that it may provide a solution to the serious financial condition of these roads."

Since no such place has yet been found for "the lesser roads," it follows that the immediate consummation of Penn-Central is not consistent with the public interest.[3]

I. NO JUSTIFICATION HAS BEEN SHOWN FOR THE COMMISSION'S FAILURE TO FORMULATE, BEFORE PERMITTING CONSUMMATION, THE ESSENTIAL CONDITIONS TO THE PENN-CENTRAL MERGER AS REQUIRED BY SECTION 5(2).

All parties concede that the consummation of Penn-Central has both long-range and short-range implications. For the long range, it is admitted that at least three railroads cannot survive as independent lines after consummation of Penn-Central, and that a place must be found for them in a major Eastern system. For the short range, the Commission found that Penn-Central could not be consummated without attaching temporary protective conditions to enable those railroads to survive until their ultimate fate has been determined.

Appellees attempt to defend the Commission's action in permitting immediate consummation of Penn-Central without determining how either (A) the long-range, or (B) the short-range consequences of the Penn-Central merger will be dealt with. Since the Brief of the Commission considers the two phases of the problem in that order, our reply will be arranged in a similar fashion.

---

[3] Appellees agree that the lawfulness of the Commission's order permitting immediate consummation of the Penn-Central merger is directly in issue before this Court. Like appellants (opening brief, p. 17), appellees recognize that the judgment of the district court sustained the Commission's order notwithstanding the procedural posture of the case arising on motions for interlocutory injunction (e.g., ICC Brief, p. 42; P-C Brief, p. 64; NY Brief, p. 9).

A. The Commission's Failure to Determine a Place for Railroads That Would Be Destroyed by Penn-Central Threatens the Public Interest in a Competitive Eastern Rail Market.

Appellees have not provided any justification for the Commission's failure even to consider the long-range repercussions of immediate consummation of Penn-Central. This is not a question of administrative discretion to deal separately with separate issues. As we shall show, by permitting consummation of Penn-Central without determining essential conditions, the Commission inherently prejudges further proceedings to the extent that a monopoly of rail transportation in New England may result although the effect of such monopoly on the public interest has never been considered by the Commission.

1. The Commission's Failure to Condition the Penn-Central Merger so as to Protect other Eastern Railroads has not been Justified.

At the outset, appellees attempt to create the impression that there is a difference of view among the appellants and the Department of Justice as to the necessity for assuring the protection of other railroads. (ICC Brief, p. 43; P-C Brief, p. 49). Penn-Central states that the Department of Justice has gone beyond the questions presented by appellants (P-C Brief, p. 49). This argument is without merit. The Justice Department has made essentially the same point as that made in the first question in appellants' opening brief (p. 25), and which Penn and Central quote elsewhere in their brief (P-C Brief, p. 23), namely, that Penn-Central should not be consummated until the future of the other Eastern railroads is assured.

Moreover, E-L and D&H have urged throughout the proceedings before the Commission that consummation be

deferred until their place in another major rail system is "assured" (327 I.C.C. at 528).[4] Indeed, the same issue now before this Court on the appeals of the protected and unprotected railroads and the Memorandum of the Department of Justice was expressly decided by the Commission on reconsideration (J.S. App. B., p. 13),[5] and was expressly considered and decided by the court below (J.S., App. A., p. 17). Under these circumstances, there is not the slightest substance to the argument that the question is not properly before this Court.

Equally lacking in substance is appellees' argument that to require the Commission to assure a proper place for the smaller Eastern railroads threatened by Penn-Central would constitute a return to a "master plan" approach to railroad mergers (ICC Brief, pp. 43-47). This is a false issue, because appellants do not seek the development of any Commission-sponsored "master plan." We do ask enforcement of Section 5(2) on the facts of this case in

---

[4] Contrary to the play on words by which counsel for Penn and Central would differentiate a "determination" of the place of the smaller railroads from "assuring" the inclusion of such railroads in a major railroad system (P-C Brief, p. 50), the Commission treated the request for "assurance" as to the proper place of these roads (327 I.C.C. at 528) as a request for "delay in the consummation of the merger until such time as [their] petitions [for inclusion] are decided" (327 I.C.C. at 531).

[5] The reason for the rule requiring that a question be raised initially before an administrative agency is to give the agency an opportunity to rule on the question in the first instance. Where the question has been raised before the Commission by any party, and the Commission has expressly decided it, the question is properly before the courts on judicial review. *Wilson & Co.* v. *United States*, 335 F.2d 788, 794 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965); *Hennesey* v. *SEC*, 285 F.2d 511 (3d Cir. 1961).

which Penn-Central is the culmination of a private "master plan" which would produce Penn-Central domination of the Eastern railroad market (see pp. 41-46, *infra*). Appellants are not arguing for any abstract or conceptual requirement that a place be found for all railroads before any railroad merger can be approved. It is because of the special facts of *this* merger, particularly the fact found by the Commission that this merger, unless properly conditioned, will destroy other Eastern railroads, that it is essential to provide conditions to protect other railroads before the cause of the threatened destruction, the Penn-Central merger, is permitted to consummate.

This is not a question of administrative procedural discretion to decide whether or not to consolidate a particular merger proceeding with other proceedings for hearing or otherwise. The question here is the determination of what the Commission itself has found to be essential conditions to the Penn-Central merger. The failure to consider issues which are critical to the legality of the Commission's approval cannot be justified as procedural discretion. We are concerned not with the form of procedures but with the substance of assuring the protection of the other Eastern railroads.

For these reasons, it is not responsive for appellees to assert that the position of appellants here is "simply a continuation" of contentions "advanced unsuccessfully in the C&O-B&O and N&W-Nickel Plate cases" (ICC Brief, p. 47; see also P-C Brief, pp. 21-22). The crucial difference here is that Penn-Central will, unless conditioned, destroy at least three other railroads whereas, in C&O-B&O and N&W-Nickel Plate, there was no such threat. Counsel for the Commission themselves concede, in C&O-B&O, "the lack of

substantial impact on the other railroads in the area"[6] and also concede, in N&W-Nickel Plate, "the lack of material adverse effect upon other railroads" (ICC Brief, p. 48). Accordingly, the question presented here of the need for completing the conditions necessary to assure the protection of other railroads was not presented in the prior merger cases relied upon by appellees for the simple reason that no other railroad was substantially affected, much less threatened with destruction.

Appellees' reliance upon prior Eastern merger cases disregards the essential difference that this Penn-Central case will produce a territory-wide carrier starting out with over half of the Eastern railroad business. Such a huge merger drastically reduces the number of alternatives available to the few remaining railroads in the East. With the Commission coming this close to the end of the merger movement in the East, it can no longer defer to another day the solution to the problems created for the remaining railroads. Consummation of Penn-Central may foreclose the only alternatives which can preserve railroad service and competition consistent with the public interest.

Appellants, of course, do not challenge the Commission's power to reserve jurisdiction to include other railroads where it is found, at the time of the approval of the basic

---

[6] In refusing to set aside the Commission's order in C&O-B&O for failure to consolidate the proceeding with other pending cases, the district court observed that "no railroad has joined" in attacking the Commission's order and that: "If Commission approval of the C&O control of B&O were prejudicial to the interests of other railroads, we might, indeed, expect the self interest of such other railroads, or groups of railroads, to urge them to join in the attack on it." *Brotherhood of Maintenance of Way Employees* v. *United States*, 221 F. Supp. 19, 31 (E.D. Mich. 1963), aff'd, 375 U.S. 216 (1963).

merger, that inclusion of the other railroads, if later ordered on equitable terms, is consistent with the public interest.[7] Nor do appellants question the Commission's power to reserve jurisdiction to consider whether future inclusion of a railroad will be in the public interest where the survival of that railroad is not threatened by prior consummation of the basic merger. But the situation here is very different, for, as the Commission found (327 I.C.C. at 529), Penn-Central will destroy E-L, D&H and B&M as independent railroads. Moreover, their inclusion in Penn-Central would create a monopoly of rail transportation in the Northeastern portion of the country (east of Buffalo and north of New York City), and the Commission has never found, or made any effort even to consider (p. 17, *infra*), how such inclusion in Penn-Central could possibly be in the public interest.[8] As a result, Commission counsel's abstract discussion of the Commission's power to reserve jurisdiction for future inclusion of railroads in

---

[7] This was the situation in *New York Central Securities Co.* v. *United States*, 287 U.S. 12 (1932), relied upon by appellees (ICC Brief, p. 59; P-C Brief, p. 27). In that case, the Commission reserved jurisdiction as to the terms of inclusion of several short lines but specifically found that inclusion of those railroads in the merged system was consistent with the public interest. *New York Central Unification*, 150 I.C.C. 278, 321-322 (1929).

[8] E-L did petition for inclusion in Penn-Central, but only as an alternative to inclusion in the N&W system. At the hearings in the Penn-Central proceeding, neither E-L, nor any other party, presented any proposal for inclusion of E-L in Penn-Central or any evidence which would support any such proposal. Since there was no basis on the record as made for any inclusion of E-L in Penn-Central there was, contrary to the argument of Commission counsel (ICC Brief, p. 66), no occasion for any unprotected carrier to complain of a "community of interest" as between the protected carriers and Penn-Central until the so-called "indemnity" conditions were prescribed in the Commission's April 6th report.

merger cases generally has no application to the facts presented here.[9]

For the same reason, the reliance by counsel upon the reservation of authority in the N&W-Nickel Plate merger as supporting the Commission's action here (ICC Brief, p. 60) is without merit. The purpose of the reservation of jurisdiction to consider inclusion of E-L, D&H and B&M in the N&W-Nickel Plate system was entirely different from the problem here in which Penn-Central threatens destruction of these three carriers. It was recognized in the N&W case that E-L would be a logical part of the N&W system, but that inclusion on equitable terms was not possible because of E-L's dismal financial condition. *Norfolk & Western Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 22 (1964). The purpose of the reservation of jurisdiction was to give E-L five years to improve its financial position to become eligible for inclusion in an N&W system on equitable terms (324 I.C.C. at 28-29).[10] This reservation of jurisdiction could be made, con-

---

[9] The other decisions relied upon by counsel for the Commission (ICC Brief, p. 60) are even further from the mark. The establishment of provisional divisions in *New England Divisions*, 261 U.S. 184 (1923), was quite different from the Commission's present action. There no essential issues were deferred. A full hearing was held and findings were made that the divisions imposed would not bear unjustly on the carriers (216 U.S. at 201). Similarly, no injury was caused by the procedures referred to in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959); *SEC* v. *Drexel & Co.*, 348 U.S. 341 (1955); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). Moreover, these cases involved special problems relating to rate regulation and corporate reorganizations which could be severed from the agency's initial action without any adverse effect on or prejudgment of the reserved issues.

[10] Since E-L is their connecting link to N&W, inclusion of D&H and B&M also depends upon accomplishing the inclusion of E-L.

sistent with the public interest, because of the Commission's express finding that the N&W-Nickel Plate transaction would not hurt but indeed would help E-L, D&H and B&M (324 I.C.C. at 27, 31). Penn-Central has frustrated this purpose by threatening the survival of E-L, D&H and B&M as independent railroads and forcing them to petition for inclusion in N&W after the lapse of only one year of the 5-year period, at a time when E-L's financial recovery is, to say the least, speculative.

Because of the serious injury which Penn-Central threatens, the Commission simply cannot fulfill its responsibility under Section 5(2) to determine whether the merger is in the public interest until it knows what protection can be afforded to prevent this injury. This is the teaching of *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Counsel for Penn and Central contend that *Scenic Hudson* "bears no resemblance" to the present case because "the Commission is not enjoined by statute to choose among a number of possible merger transactions" (P-C Brief, p. 29). No such distinction appears from a reading of that case. In *Scenic Hudson*, the court required the FPC to reconsider the power project, and the matter of providing protection for fish, because there was no finding showing how adequate protection was feasible. Although the FPC had said that it would later devise protective facilities to avoid any adverse effects upon the fish, the court found this statement of intent inadequate; it was necessary for the record to show, *before* the project was licensed, that protection was feasible (354 F.2d at 624). No special statutory provision was relied upon (354 F.2d 623-25). The court simply applied the realistic principle that in order to assure that protection would in fact be afforded it was necessary to have a record showing how it would be done. The same principle applies here. A record must be made

demonstrating the feasibility of protecting the adversely affected railroads before Penn-Central is consummated.

In deferring the determination of essential protective conditions, the Commission failed to discharge its "immediate responsibility" under Section 5(2). As in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (1935), the Commission shifted an immediate responsibility "from the shoulders of the present to the shoulders of the days to come," leaving other carriers "helpless in the interval" (294 U.S. at 510). What was condemned in that case, contrary to the assertions of counsel (P-C Brief, pp. 29-30), was precisely the kind of administrative action involved here. This Court criticized the Commission for failing to view a particular rate proposal in the context of the rate structure of the entire market—it had "not adjudged the fairness of the relation" between rates (294 U.S. at 510) and it had failed to make adequate findings as to the effect of the proposed rate upon the existing structure (294 U.S. at 508). When this Court reproached the Commission for "piecemeal action," it was criticizing the Commission for the same faults which flaw this proceeding—"inaction and postponement" in failing to consider the consequences of its action and in failing to complete its job of facing up to the grave problem which its order creates.

2. Commissioner Webb's Recommended Report in I.C.C. Finance Docket 21510 Illustrates the Serious Long-Term Repercussions Resulting from the Commission's Failure to Determine Essential Conditions to the Penn-Central Merger Prior to its Consummation.

The Penn-Central Brief refers at three points to the recommended report of Commissioner Webb served on December 22, 1966, in the proceeding in which E-L, D&H and B&M are seeking inclusion in the present N&W system. The first reference states that the recommended report would

"direct N&W to include E-L and D&H in its system on specified terms and authorize it to include B&M as well," indicating progress in resolution of the fate of the protected carriers (P-C Brief, p. 10). The second reference states that Commissioner Webb has ruled that "there is no occasion to reduce the price which E-L and D&H are to receive from N&W by reason of any consequences of the Penn-Central merger," indicating that this would render moot the question of capital loss indemnity (*id.* at p. 48). The last reference states that Commissioner Webb's conclusion not to compel inclusion of B&M "was not related to the impact of that [Penn-Central] merger" (*id.* at p. 53).

Counsel for Penn and Central thus convey the impression that all is progressing smoothly in the N&W inclusion case without any problems arising from the Penn-Central merger. The facts are quite the opposite.

Commissioner Webb opens his discussion of the "Relationship of These Proceedings to the Penn-Central Case" as follows (Recommended Rep., p. 23):[11]

> "Neither this case nor the *Penn-Central* case can be fully understood if consideration of one is divorced from the other. Unfortunately, the Commission's action in deciding the cases separately has tended to blur vital issues common to both proceedings."

The discussion which follows in Commissioner Webb's recommended report has great significance for the proceedings in this Court because it illustrates the "box" in which the Commission has placed itself, to the detriment of the public interest, through its failure to complete its function under Section 5(2) of determining the essential conditions to the Penn-Central merger before authorizing consumma-

---

[11] Copies of Commissioner Webb's Recommended Report in I.C.C. Finance Docket 21510 have been lodged with the Court.

tion. Of course, this recommended report is not final and exceptions to it will be taken, but it was written by a Commissioner who participated in the Commission decisions in Penn-Central, and it emphasizes and illustrates the serious harm that will accrue because of the Commission's fragmentation of the issues relating to the restructuring of the Eastern railroads while allowing the disrupting factor—the Penn-Central merger—to go ahead. Commissioner Webb confirmed this effect of Penn-Central (Recommended Rep., p. 14):

> "An important fact in this proceeding is that the inability of E-L, D&H and B&M to survive as independent carriers is not a direct consequence of the C&O-B&O or N&W-Nickel Plate-Wabash unifications but is a direct and inevitable result of the Penn-Central merger."

The "box" which the Commission has created for itself is best illustrated by the Boston & Maine, the only railroad serving New England generally, apart from Central and the New Haven, both of which are to be a part of the Penn-Central system. Commissioner Webb found that B&M's "prospective earning power . . . is so small that only a nominal value can be placed on its stock" (Recommended Rep., p. 153), and that "it would be inequitable both to N&W and to B&M to grant B&M's petition by directing inclusion on the basis of nominal consideration" (*id.* at pp. 153-154). Based on these findings, Commissioner Webb refused to recommend that N&W be required to include B&M in its existing system.[12] But the Commissioner recognized

[12] Although Commissioner Webb found that B&M had only a "nominal value," he recommended that N&W be authorized to acquire B&M by paying twice that amount (*id.* at p. 156). This "authorization" has no practical significance because N&W's management could not justify to N&W's stockholders any purchase of B&M under such conditions.

that B&M could not survive as an independent carrier in the face of a consummated Penn-Central merger (*id.* at p. 23).

Commissioner Webb thus recognized that, with the consummation of Penn-Central, there are only three alternatives for dealing with B&M. Those alternatives are: (1) continuation as an independent carrier; (2) inclusion in the existing N&W system; (3) inclusion in Penn-Central. Because B&M could not survive as an independent carrier,[13] and because the Commission had never found that Penn-Central would be in the public interest if B&M were destroyed, the first alternative was treated as foreclosed by the Commission's decision to permit immediate consummation of Penn-Central. Because no equitable terms could be found for inclusion of B&M in the existing N&W system, the second alternative was not available.[14]

Faced with this dilemma, Commissioner Webb held that: "Necessarily implied in the prior report in this proceeding and in the reports in the *Penn-Central* case is the conclusion that E-L, D&H, and B&M, in all probability, will be included either in the existing N&W system or in the Penn-Central system" (*id.* at p. 26), and that "the *Penn-Central* reports indicate that the merger would be consistent with the public interest notwithstanding any lessening of intramodal competition resulting from inclusion of E-L, D&H

---

[13] Commissioner Webb also recognized that the temporary protective conditions could not be a permanent solution to the problem, because that would eliminate the very benefits which justify the merger (Recommended Rep., p. 26).

[14] The same problem would be presented with respect to E-L and D&H, as well as B&M, if N&W should prevail in its contention that equitable terms cannot be formulated for those carriers (*id.* at pp. 23-28).

and B&M [in Penn-Central]" (*id.* at p. 27).[15]

Commissioner Webb frankly stated that the reason B&M (as well as E-L and D&H) could command a higher price for inclusion in Penn-Central than N&W could equitably be required to pay was B&M's "strategic value" to Penn-Central (*id.* at p. 154), meaning B&M's value in giving Penn-Central a monopoly of rail traffic in New England (*id.* at p. 24):

> "Whatever problems a Penn-Central merger may pose for N&W, C&O-B&O, WM, Reading and CNJ, the problems of EL, D&H, and B&M could be solved as readily by including them in the Penn-Central system as by including them in the N&W system. Their value to Penn-Central probably would be greater than their value to N&W in view of the anti-competitive aspects of a PRR-NYC-NH-EL-D&H-B&M unification."[16]

Thus, Commissioner Webb, has found that, by "implication," the Commission has approved the creation of a monopoly in rail transportation for New England.

Any such result can be derived only by implication from the Commission's report since none of the reports contains any explicit findings indicating that any consideration has

---

[15] The complete discussion in the recommended report relating to the Commissioner's conclusion that approval of Penn-Central carried the necessary implication that the protected carriers will be included in the Penn-Central system if equitable financial terms for their inclusion in the existing N&W system cannot be found is reproduced as Appendix A to this brief.

[16] Commissioner Webb also recognized that B&M has a greater value to an N&W-C&O system than to the existing N&W system (*id.* at p. 154), but, on the assumption of consummation of Penn-Central, held that B&M could be included in Penn-Central without awaiting the outcome of the N&W-C&O proceeding (*id.* at p. 26, 156).

been given to the effect on competition of including E-L, D&H or B&M in the Penn-Central system. On the contrary, the Commission's Examiners found that "no effort" had been made to give any consideration to this problem (Ex. Rep., p. 418):

> "No consideration has been given to the effect of the proposed inclusion here [in Penn-Central] of the D&H, B&M and/or E-L upon competition, and no effort has been made to assess or accommodate the anti-trust laws in light of such action. We believe resolution of such issues would be premature."

These findings of the Examiners were expressly adopted by the Commission (327 I.C.C. 481-482).

By allowing Penn-Central to consummate immediately, the Commission has thus created an intolerable situation. Although it is undisputed that Penn-Central is the source of injury to the three protected carriers, Penn-Central is permitted to consummate while the remaining Eastern railroads and the shipping public bear the injury in the form of drastically reduced rail competition and a deterioration in the competitive ability of the remaining carriers.[17] If this is to be the nature of the Penn-Central merger transaction as finally conditioned under Section 5(2), it should follow from a thorough examination of the Penn-Central merger in its impact upon other carriers and upon competition and not as the haphazard implication of procedures which, as Commissioner Webb observed, have "tended to

---

[17] Inclusion of B&M in Penn-Central would also make even more difficult the problem of including E-L and D&H as parts of an N&W system since B&M interchanges long-haul traffic with E-L and D&H. As Commissioner Webb recognizes, even leaving B&M as an independent railroad would adversely affect a system composed of N&W, E-L and D&H (Recommended Rep., p. 66). With B&M as a part of Penn-Central, the effect would be catastrophic.

blur vital issues" (Recommended Rep., p. 23). Clearly, a matter as important as creating a rail monopoly in New England requires that the Commission focus on the issue and not let such a result follow by implication. See *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154 (1965). And at the very least, the Commission should preserve and explore all alternatives which might avoid injury to competition, including the N&W-C&O proposal for balanced competition throughout the East.

Thus, Commissioner Webb's recommended report provides a dramatic illustration of the necessity for deciding, before consummation, the essential terms and conditions of the Penn-Central merger under Section 5(2). Unless this requirement is enforced in this case, the forces set in motion by consummation of Penn-Central may inevitably lead to a monopoly of rail transportation never considered by the Commission.

The Commission's failure to complete the task of formulating conditions before permitting consummation of Penn-Central also creates an intolerable situation with respect to the capital indemnity issue. The need for resolution of this issue is also emphasized by Commissioner Webb's recommended report.

In his report, Commissioner Webb finds as a fact that Penn-Central will cause a diminution in E-L's earning power as a subsidiary of N&W. Upon finding annual earnings of $9.9 million as a basis for E-L's valuation, Commissioner Webb determined that the overall impact of Penn-Central on E-L as a part of the present N&W system would be a reduction in E-L earnings of $3.5 million, a 36% reduction in the value of E-L's equity capital as found in the report (Recommended Rep., pp. 66, 104). Underlying Commissioner Webb's refusal to reflect this diminution in E-L's value in his recommended terms for inclusion is the as-

sumption that, because N&W did not show how much it would lose to Penn-Central, there would be a comparable loss for N&W (an assumption which implies an annual loss of $39 million of N&W earnings and over $120 million in N&W gross revenues to Penn-Central). If Penn-Central is to be assumed to have an impact of such magnitude upon one unprotected carrier, this is a further reason for reappraising the effect of Penn-Central on the public interest in preserving the railroads outside the proposed Penn-Central system.

But without pausing here to analyze the validity of his assumption, it is sufficient to note Commissioner Webb's acknowledgment that the Commission may well not accept such an assumption. Commissioner Webb expressly found that, if the Commission is not willing to disregard the impact of Penn-Central upon E-L's earnings, "it will not be possible . . . to construct stock exchange ratios which are equitable to both N&W and to E-L unless E-L or N&W receive capital loss indemnification from Penn-Central" (*Id.* at p. 43).

Thus, payment of a capital indemnity could well be essential to inclusion of E-L in the N&W system (instead of creating further monopoly by inclusion of E-L, as well as B&M, in Penn-Central).[18] But the Commission has yet to determine whether it has the power to impose a capital indemnity condition or whether such a condition should be imposed. There are serious objections to this device, since payment of a capital indemnity fails to restore the destroyed competitive ability for which it is compensation (as discussed in our opening brief, pp. 31-32). Penn and Central oppose any condition calling for payment of a capital indemnity.

---

[18] This also applies to D&H inasmuch as inclusion of D&H in the present N&W system is conditioned on inclusion of E-L (Recommended Rep., pp. 138, 160).

They persist in their position that the Commission is without power to impose it and that they are entitled to judicial review on this issue if a capital indemnity condition is imposed.

But if, as Commissioner Webb finds, the payment of a capital indemnity is an essential condition to an inclusion of E-L which takes into account the adverse effect of Penn-Central, the public interest obviously requires that the questionable status of such a condition be settled before consummation of the Penn-Central merger. Otherwise, if either the Commission or a court, on the judicial review reserved by Penn-Central, holds against a capital indemnity requirement, the restructuring of the remaining Eastern railroad market may never be accomplished. Penn-Central will have been consummated, and it will be impossible to protect E-L or D&H except by an inclusion in Penn-Central, causing a further monopoly of inter-city rail transportation.

The Commission's failure to resolve the question of capital indemnity before permitting consummation of Penn-Central is thus another example of the pressing need in this case for the determination of the essential terms and conditions of the Penn-Central merger as required by Section 5(2). Until these essential conditions are determined, neither the Commission nor a reviewing court can know the nature of the transaction, as conditioned, which must be found to be consistent with the public interest before it may be approved by the Commission under Section 5(2).

B. The Commission's Failure to Determine Interim Protective Conditions for Railroads Threatened By the Penn-Central Merger Will Cause Irreparable Injury to Both the Protected Carriers and the Unprotected Carriers.

Our opening brief (pp. 27-33) discussed the question of whether it was feasible to fashion the interim protection

which the Commission found was an essential condition to the Penn-Central merger but which the Commission had been unable to determine in its two reports. The Commission simply assumed that, somehow, it could frame conditions which would lawfully reconcile the conflicting interests of the protected carriers, the unprotected carriers and the public interest in efficient competitive rail transportation. Counsel for the Commission concede that this all rests on assumption: "The Commission's Report on Reconsideration necessarily reflects its belief that it can devise conditions which will adequately protect E-L, D&H and B&M without undue injury to other railroads" (ICC Brief, pp. 66-67). Such an essential matter may not lawfully be left to the implied "belief" of the Commission that it can somehow reconcile all of the conflicting interests.[19]

The strategy of Penn and Central is to let the protected carriers and the unprotected carriers fight between themselves in allocating the injury which a Penn-Central merger will inflict. Every objection made by the unprotected carriers is met by the Penn and Central argument that their proper remedy is to wait until the Commission finally determines the conditions to the merger and then seek "appropriate judicial relief" (P-C Brief, p. 36). The protected carriers, at the same time, are told that if they do not obtain adequate conditions, they "again will have the right to review the propriety of that redetermination under the standards of the Interstate Commerce Act" (P-C Brief, pp.

---

[19] Appellants did not concede in the district court that it was possible to create protective conditions which could reconcile the diverse interests at issue. In stating that we were not asking the district court to decide that the task was impossible (quoted out of context in ICC Brief, p. 67), we were asking the district court not to prejudge the question of possibility or impossibility either way but, instead, to stay the merger until the Commission had held a hearing and attempted to formulate such conditions (R. 2808-2809).

42-43). Penn and Central thus would have the protected carriers and the unprotected carriers fight out the question of which group should bear the major brunt of the merger, while Penn-Central takes as much of the traffic of both groups as it can.[20]

This is neither a necessary nor a lawful procedure to follow in this case. The controversy here is, or ought to be, between Penn and Central, on the one hand, and the protected carriers, on the other, since the Commission has found that the merger cannot be consummated unless protection can be afforded. That controversy should be settled in a proper and lawful manner between those parties, without impinging upon the rights of other carriers before consummation of the Penn-Central merger, which is the cause of all the injury, is permitted.[21]

As we shall show, neither the traffic protective conditions

---

[20] Appellees are not able to defend the basic premise of the majority opinion below that the court itself could "require appropriate change" in any improper conditions prescribed by the Commission after hearing (see opening brief, p. 35). Appellees concede (ICC Brief, p. 68-70; P-C Brief, p. 32) that under *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952), a reviewing court exceeds its powers if it decides what conditions should or should not be attached to a transaction approved by an adminstrative tribunal.

[21] Appellees note that one of the protected carriers, B&M, has not appealed and is apparently satisfied that the Commission will protect its interests (ICC Brief, p. 11; P-C Brief, p. 13, n. 11; NH Brief, p. 19, n. 27; NY Brief, p. 21). Viewed realistically, this means that B&M believes, as Commissioner Webb has found (p. 16, *supra*), that it can obtain a better price from Penn-Central because of its strategic value in giving Penn-Central a monopoly of rail traffic in New England.

B&M's position as a prospective affiliate of Penn-Central is the complete answer to the argument of New York that the protected carriers would resist the inducements to divert traffic created by a temporary indemnity arrangement because they are potential affiliates of N&W (NY Brief, p. 24) (The same applies to E-L and D&H, as well, if their losses to Penn-Central are recognized in determining their value).

nor the indemnity conditions provide the basis for any "belief" that the Commission can provide lawful and effective interim protection.

1. The Traffic Protective Conditions Do Not Purport to, and Cannot, Provide Adequate Protection.

In their effort to avoid facing the injurious consequences of the so-called "indemnity" conditions, appellees emphasize the traffic protective conditions as though those conditions alone were adequate (ICC Brief, pp. 61, 65; P-C Brief, p. 41).

There is no basis for any such argument in any finding of the Commission. Nor could the Commission have so found. Even on the assumption that the traffic conditions impose a complete freeze on all competitive activities of Penn-Central which might divert or tend to divert traffic from the protected carriers, the very fact of merger and elimination of competition between Penn and Central produces new single-line service throughout the East which will attract shippers. This effect is inherent in consummation of Penn-Central and occurs automatically without Penn-Central having to take any affirmative act which could possibly be covered by any traffic protective conditions.[22]

---

[22] An illustration of this would be a manufacturer located on Penn's lines in Indiana shipping to Boston. The routes would include a Penn haul 100 miles to interchange with Central for the haul to Boston, or a Penn haul of 500 miles to interchange with D&H, thence B&M to Boston. Because Penn is the origin carrier, providing cars and other services, the shipper today would normally give Penn its long haul via D&H and B&M. But immediately upon consummation of Penn-Central, the shipper would no longer have any reason for using the Penn-D&H-B&M route since the Penn-Central long haul (with the benefits of single-line service) would be via the present Penn-Central route. This impact of the loss to the protected carriers of Penn as a "friendly connection" (emphasized in the Examiners' Rep. p. 429) affects the carriers outside Penn-Central immediately and occurs wholly apart from any change in present service or rates.

Moreover, it is illusory for counsel to refer generally to the traffic conditions as though their meaning and effect were known. The reality is that no one knows what the traffic conditions mean or what their effect will be. It is true that counsel for Penn and Central left the impression with the court below that the conditions as prescribed covered every conceivable act of the merged company that would divert or tend to divert traffic from the protected carriers.[23] However, the Commission has never focused on the actual application of these conditions to specific situations, and has only begun to do so in the hearings recently conducted.[24] At those hearings, a number of specific areas of controversy arose, including the following illustrative problems:

> Does the prohibition against "improvement in service" include competition for freight traffic by furnishing new and better freight cars? Could Penn-Central coordinate its car fleet and buy new cars, or must Penn-Central maintain the same degree of car shortage which exists today?
>
> Could Penn-Central make any service improvements or rate changes which Penn or Central might have made

---

[23] In their supplemental brief in the district court, filed on September 27, 1966, after oral argument, Penn and Central represented as follows (p. 4):

> "These *status quo* conditions will restrain the merged company from engaging in any action which would divert or tend to divert traffic from the protected lines and provide a procedure for their enforcement. They are by all odds the strictest protective conditions ever prescribed . . .
>
> "No broader, more stringent, or more inclusive restraining order could be devised."

[24] These hearings, which were expressly not precluded by this Court's stay order of October 18, 1966, began on October 31, 1966, with respect to the capital indemnity issue, reached the temporary traffic and indemnity conditions issues on December 5, 1966, and concluded on December 16, 1966. A copy of this record has been lodged with the Court.

as separate carriers? If so, how could the protected carriers or the Commission determine whether a particular service improvement or rate change would, in fact, have been made had it not been for the merger? Would Penn-Central be prohibited from soliciting the business of present shippers of the protected carriers?

Before the Commission, the protected carriers are contending for a complete freeze on all of the activities of Penn-Central which would divert or tend to divert their traffic. Penn and Central, on the other hand, are seeking considerably more freedom in each of the controverted areas listed above.[25] If Penn and Central prevail, the protection which the protected carriers thought they were gaining from the traffic conditions would be illusory. On the other

---

[25] For example, counsel for Penn and Central expressly urged before the district court that the traffic conditions would prohibit Penn-Central from solicitation (R. 149):

> "There is no ambiguity there. The prohibition of action is broad, extending to any practice or conduct, including solicitation efforts by the merged company which would divert traffic of E-L or D&H from their lines."

See also the colloquy quoted in our opening brief (p. 50, n. 30).

However, Penn's Traffic Vice President repudiated that position in the hearings before the Commission. When asked whether he agreed with the above-quoted statement made before the district court, the witness testified as follows (December 15, 1966, hearing in I.C.C. Finance Docket 21989, Tr. 22328):

"Q. That means you may not solicit traffic against the D&H?

"A. No. We are soliciting traffic against the D&H now. We certainly are not going to—I don't consider that we should be restricted from soliciting traffic from the D&H. I think we are restricted from drastically improving the service of the merged property that would tend to divert a substantial amount of business from the Erie or the D&H.

"Q. So far as you are concerned, you would repudiate this statement if it means that the merged company may not solicit traffic against the D&H?

"A. I think we should be free to solicit traffic. We certainly aren't expected by the Commission to stand idly by while the D&H solicits all our business from us . . ."

hand, if the traffic conditions prevent Penn-Central from providing any improvements and efficiencies in service, that will foreclose any of the benefits upon which the Commission relied as the basis for permitting immediate consummation of the Penn-Central merger (as discussed at pp. 33-36, *infra*).

Accordingly, there is no basis for the Court to assume, as appellees would have it assume, that the traffic conditions are adequate. Such an assumption would require a prejudgment by this Court as to the meaning and effect of the traffic conditions where the sharply contested issues have not yet been resolved by the Commission. The traffic conditions, far from justifying the Commission's failure to determine other essential conditions to the merger, are just another example of the Commission's failure to complete its statutory duty under Section 5(2) of determining the specific terms of a transaction before deciding whether, as conditioned, that transaction is in the public interest.

2. "Indemnity" Conditions, Although Basic to the Commission's Protective Scheme, Are Illegal.

Another basic problem posed by consummation of the Penn-Central merger subject to the Appendix G conditions arises from the indemnity provisions originally prescribed in that Appendix, which were rescinded in the Commission's supplemental report, but which were expressly made subject to retroactive reinstatement. Penn and Central suggest that the Commission might formulate a different mode of financial indemnification (P-C Brief, p. 38), but there is no basis for that suggestion.

At the recent hearings before the Commission, the protected carriers proposed that the original "indemnity" conditions be reinstated but with modification to increase the amount of the payments. No party came forward with any

alternative suggestion, although the Hearing Examiner specifically ordered that any such suggestion be submitted in writing.[26] The evidence of Penn and Central and the protected carriers dealt entirely with the amount of the indemnity factor. On the issues thus presented, it is apparent that the Commission will reimpose the indemnity provision originally prescribed in some sweetened form.[27]

The Commission made plain its intent to reimpose the indemnity conditions when it provided for their effectiveness retroactive to the date of consummation (J.S., App. B, p. 44), and in holding the indemnity scheme legal in the face of Section 5(1) of the Interstate Commerce Act (*id.* at pp. 38-39). Both Commission counsel and Penn-Central argue that the indemnity provisions involved here do not create a traffic or revenue pool and that Section 5(1) does not therefore apply (ICC Brief, p. 71; P-C Brief, p. 44), but their arguments are without merit.

---

[26] Hearing of December 9, 1966, in I.C.C. Finance Docket 21989, Tr. 21850.

The only suggestion advanced by any party for modification of the indemnity provisions to remove the incentives for diversion of traffic was that of the State of New York, which proposed a "holddown" (referred to in NY Brief, p. 25) that would superimpose on the indemnity formula a limitation based on the percentage each carrier's revenues represented to the total of all Eastern revenues. No other party to the proceeding supported this far-fetched suggestion, which would not actually remove the incentive for diversion in most cases and when it did might also deprive a protected carrier of a needed indemnity for traffic actually lost.

[27] The issues before the Commission also include the impact upon the unprotected carriers of the new traffic routing incentives created by an indemnity arrangement (as discussed in our opening brief, p. 29). Penn and Central argue that their affidavits before the district court show that there are no such incentives (P-C Brief, p. 37), but those affidavits missed entirely the only point here, namely the incentives that would be created by an indemnity arrangement (R. 2669-2670).

Pooling was defined as follows in *Kennedy* v. *Long Island Rail Road Co.*, 319 F.2d 366, 374 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963):

> "at the time the act was passed, 'pooling' was defined as simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits."

This precisely describes the arrangement which the Commission originally imposed and which the protected carriers still urge. The traffic conditions are designed to maintain the physical distribution of traffic between each of the protected lines and the new Penn-Central system as it was prior to merger, and the indemnity provisions are intended to "equalize the disadvantages" to the extent the specified physical division changes. If Penn-Central secures more than its allocated share of traffic, it must pay to E-L, D&H and B&M the profits they would have made had they each carried their allocated share.[28] Moreover, the conditions create incentives for the protected carriers and Penn-Central to work together in diverting traffic from other lines to any of the participants in the pool (see our opening brief, p. 29).

The Commission's assertion that the proposed indemnity provisions do not create a pool because there is no " 'contract, agreement, or combination' entered into by the carriers involved" (J.S., App. B, p. 38-39) is erroneous. In

---

[28] Arguments that the indemnity scheme is not a pool because it merely preserves the status quo and because it lacks mutuality (ICC Brief, p. 71; P-C Brief, p. 44) are entitled to no weight. There is no lack of mutuality where, as here, Penn and Central are permitted to merge and to attract traffic through elimination of competition by their agreement to accept the indemnity conditions.

promulgating the indemnity provisions of Appendix G, the Commission was proposing a revenue pool "upon its own initiative" as is provided in Section 5(1). By making its proposal a condition to immediate consummation of the Penn-Central merger, the Commission afforded Penn and Central an opportunity to assent to the proposal, or to reject it (327 I.C.C. at 563). That permission for immediate consummation was the inducement for their assent does not make their agreement any less consensual. See *Boston & Maine R. Pooling, etc. Application,* 298 I.C.C. 703, 712, 715-17 (1956). The protected carriers are also afforded their opportunity to assent by seeking and accepting indemnity payments.[29]

The appellees are also in error in supporting the Commission's position that pooling arrangements may be prescribed without making the findings required by Section 5(1) (ICC Brief, pp. 71-72; P-C Brief, p. 46, n. 25). In *Chicago & N.W. Ry. Co.* v. *Peoria & P.U. Ry. Co.,* 201 F. Supp. 241 (S.D. Ill. 1962), *aff'd,* 319 F.2d 117, (7th Cir. 1963), *cert. denied,* 375 U.S. 969 (1964), the courts considered the claim that the Commission's approval of a pool under Section 5(2), as a part of its approval of a transaction requiring Section 5(2) approval, satisfied the requirements of the Act. The claim was flatly rejected. As the court of appeals held, proceedings under Section 5(2) "cannot be substituted or take the place of proceedings under Section 5(1)" (319 F.2d at 122).

---

[29] Indeed, the Commission's scheme requires the assent of the parties or it would be unlawful for the further reason that Section 5(1) precludes the Commission from compelling carriers to enter into pooling arrangements. *Fifteen Per Cent Case,* 179 I.C.C. 215, 218 (1931). Congress, in adopting the Transportation Act of 1940, expressly rejected the Commission's request for such authority. 84 Cong. Rec. 6064 (1939); H.R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12 (1939).

This holding is clearly dictated by the express terms of Section 5 of the Interstate Commerce Act. Section 5(11) grants relief from "restraints, limitations, and prohibitions of law" *only* to those "participating in a transaction approved or authorized under the provisions of this Section . . . "—that is, Section 5 itself. *Atlantic Coast Line R. Co. v. United States,* 284 U.S. 288 (1932), relied upon by Penn and Central (P-C Brief, p. 46, n. 25), is therefore inapposite, since it dealt with a limitation of law imposed by Section 15, not Section 5. Indeed, the limited exception specified in Section 5(1) for pools authorized by the terms of Section 1(16) of the Act[30] in itself conclusively demonstrates that all other pooling arrangements must be measured by the standards of Section 5(1).

Penn and Central assert that there is no "obstacle to the making of the statutory findings by the Commission if it is assumed that such findings would be required" (P-C Brief, p. 46). But Section 5(1) permits the Commission to approve only those pools which are both "in the interest of better service to the public or of economy in operation and will not unduly restrain competition," and there was no evidence introduced in the recent hearings before the Commission to support these findings. Taken as a whole, the indemnity provisions, with their accompanying traffic conditions, preclude the accomplishment of better service to the public and economy in operation otherwise inherent in the Penn-Central merger; and, indeed, if the protected carriers' view of the conditions is adopted, the indemnity scheme may cause the service offered by Penn-Central to be inferior to that which could be afforded by Penn and Central separately.

---

[30] 49 U.S.C. § 1(16). Section 1(16) deals with the situation in which a carrier is "unable to transport the traffic offered it so as to serve the public," authorizing the Commission to direct the distribution of the traffic of such carrier over other railroads.

The fact that the pooling arrangement would have as its long range object "the continuance of the services of E-L, D&H and B&M" (ICC Brief, p. 72; see also P-C Brief, p. 46) would not justify the Section 5(1) findings. The questions under Section 5(1) are whether, whatever the object of the pool, an undue restraint of competition is being created and whether the pool will provide better service to the public. The indemnity scheme proposed here suppresses competition between Penn-Central and the protected lines. With respect to the protected carriers, the proposed indemnity payments represent nothing more than temporary compensation for a permanent loss of traffic, designed to keep them alive until the burden of their continued existence can be forced on N&W. It is simply a device to fix the price Penn-Central must pay to buy the traffic on which these carriers ultimately must depend for their continued survival.

Penn and Central miss the point when they suggest that if the indemnity conditions constitute an illegal pool, our proper remedy is to seek "appropriate judicial relief from the conditions if they are in fact reimposed" (P-C Brief, p. 36). It is true that the unprotected carriers could have the illegal conditions set aside after they are reimposed, but where would that leave the protected carriers?[31] Our

---

[31] Commission counsel claim that appellants' right to judicial review of protective conditions would not be impaired by consummation because a reviewing court could order dissolution of the merger (ICC Brief, p. 70). The court below acknowledged that the adverse effects of ordering dissolution "would impair true freedom of decision" (J.S., App. A., p. 35), and this understates the situation in view of the practical problems of unscrambling the operating, administrative and financial aspects of the combination (as discussed in our opening brief, pp. 33-34). And in the interim between consummation and any dissolution after judicial review, irreparable injury will already have occurred.

If it is even possible that immediate consummation of Penn-

concern is not an altruistic one. If Penn-Central is consummated, the protected carriers are going to have to become a part of another major rail system if a rail monopoly in the East is to be avoided. Moreover, if the Penn-Central merger is consummated before conditions are worked out, the Commission will be under intense pressure to impose interim protection without regard for the harm to the unprotected carriers.

II. IMMEDIATE CONSUMMATION OF THE MERGER, AS CONDITIONED, WOULD SERVE NO PUBLIC INTEREST AND SIMPLY WOULD FURTHER A PLAN TO ASSURE PENN-CENTRAL DOMINATION OF THE EASTERN RAILROAD MARKET.

All of the appellees stress the advantages which the Penn-Central merger is supposed to have from the standpoint of the public and urge that postponement of consummation of the merger would involve the sacrifice of these advantages (see, *e.g.*, ICC Brief, p. 52). Penn and Central stress the savings that can be realized from the merger and the service improvements which can be instituted (P-C Brief, p. 19). The New Haven argues that the merger will provide a solution for its problems and thus will assure that the public will continue to enjoy its services (NH Brief, pp. 39-41). Upon analysis, however, these contentions will not stand up. For insofar as savings and service improvements are concerned, appellees' arguments are based upon the original merger proposal, not upon the merger as it is or will be conditioned by Appendix G. And solution of the New Haven problem is not shown to be dependent upon immediate consummation of the merger,

---

Central would thereafter require that the merger be unscrambled (and Commission counsel obviously regard that as at least a possibility in their argument), this possibility is itself sufficient reason for not permitting consummation at this time.

regardless of what the conditions of the merger may be. Indeed, as will be shown, immediate consummation of the merger would have no advantage to the public at all, for it would only further a plan designed to assure Penn-Central domination of the Eastern railroad market.

A. Immediate Consummation of the Merger Would Produce Neither Savings to Penn-Central nor Benefits to the Public.

The claim that there are large benefits to the public possible through consummation of the merger is basic to the position of all of the appellees here. For example, Penn and Central emphasize at the outset a Commission finding that "the economies realized through the merger 'will redound in large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates.' 327 I.C.C. at p. 491" (P-C Brief, p. 19).

But these pious declarations are all beside the point in considering immediate consummation of Penn-Central subject to the traffic conditions of Appendix G. Under those conditions, there is no basis for believing that there will be *any* significant economies or, if there are any, that such economies will be reflected in improved service or lower rates. Indeed, the testimony of Penn before the Commission shows that no such benefits will be realized so long as the Appendix G conditions remain in effect.

All of the evidence originally in the record before the Commission dealt with savings and service improvements that would have been achieved if no such conditions had been imposed. The situation is entirely different under Appendix G, particularly if those traffic conditions are interpreted to place an absolute freeze upon all competitive actions of Penn-Central, as contended for by the protected carriers (see discussion at pp. 23-26, *supra*). At the recently reopened hearings, Penn Vice-President Large testified

that the traffic conditions would "deprive the shipping public of the improved service that merger is designed to provide,"[32] that "there is no chance of any substantial savings in the next two years" and that "the first two million dollars we save as a result of merger is a good five years away."[33] Penn's witness also destroyed a basic premise of the Commission's approval that merger savings would be passed on to the public in the form of lower rates.[34] While this Court need not now evaluate this latter evidence, it emphasizes the total absence of any evidence in the record to support the contention that savings to the carriers and public benefits would flow from immediate consummation of the merger.[35]

Penn and Central impliedly recognize this defect in the record when they admit that "it may be true that the protective conditions prescribed by the Commission will during

---

[32] I.C.C. Finance Docket 21989, Exhibit FH-51, p. 1.

[33] Hearing of December 15, 1966, I.C.C. Finance Docket 21989, Tr. 22343-22344.

[34] Hearing of December 15, 1966, I.C.C. Finance Docket 21989, Tr. 22344:

> "Q. Suppose after the merger you have lower costs on the merged system as a result of some savings that you realize in overhead or something like that, would you expect to reflect those decreased costs in lower rates?
>
> "A. Oh, I think that is really a non-related question. I consider that the level of freight charges today are so marginal that I cannot conceive of any savings that we might get out of this merger having an impact on any pricing decisions."

[35] The limitation in the traffic conditions to changes as to routes in which the protected carriers are "competitive factors" (327 ICC at 561) does not significantly limit the effect of the restrictions because the only area in which the merger would produce efficiencies is the area in which both Penn and Central operate today, and it is in the routing to and from that same area that the protected carriers are "competitive factors."

their term to some degree decrease the immediate savings and efficiencies the merger would otherwise produce" (P-C Brief, p. 59). However, they seek to avoid the implication of this admission by claiming that "consummation of the merger will . . . permit Penn and Central to *begin* the 'program of extensive capital improvements scheduled over a 4-year period,' referred to by the Commission in its original report" (P-C Brief, p. 58). But there is no more evidence to support the claim that Penn and Central could *begin* making improvements under the traffic freeze imposed by Appendix G than there is to support the claim that savings and benefits to the public could be realized under those conditions. Indeed, the very idea of beginning a program of capital improvements is inherently incredible so long as Appendix G is in effect for an indefinite period, since Penn and Central would be barred from using such improvements to produce savings or provide better service. In such a situation, the suggestion that the merged system could or would build new facilities to remain idle while continuing to use the old facilities is fanciful.

Even if there were some savings to Penn-Central or benefits to the public to be realized from the merger as conditioned, there has been no showing that these advantages are not outweighed by the serious anti-competitive effects of the Appendix G conditions. There is neither evidence nor findings on this subject in the record now before the Court. In the re-opened proceedings, this issue has been squarely presented by the testimony of Dr. Merton J. Peck, Professor of Economics at Yale University, who analyzed the Appendix G conditions and described in detail the anti-competitive effects of the traffic conditions and any indemnity conditions as market-sharing and revenue-sharing devices.[36] The Court can hardly assume that a Penn-

[36] Dr. Peck's testimony is set forth in Appendix B, attached hereto.

Central merger subject to conditions such as those prescribed in Appendix G is beneficial on balance to the public when the Commission itself has not yet made that determination, and when the issue is still pending before the Commission.

B. The New Haven Situation Provides No Basis for Rushing Consummation of Penn-Central.

Since consummation of the merger cannot be supported on any theory of savings or benefits to the public so long as the conditions of Appendix G are necessary, the only ground left upon which immediate consummation of the merger can conceivably be upheld is that this is somehow necessary to save the New Haven. This point is stressed by the New Haven Trustees who, while professing exclusive concern for the "public interest" (NH Brief, pp. 26-30), are parties to a contract to sell the New Haven properties to Penn-Central for a substantial consideration. As their part of the bargain, the Trustees have agreed to use "their best efforts" to secure immediate consummation of the merger.[37]

---

[37] The agreement between the Trustees and Penn and Central not only provides that the Trustees "use their best efforts . . . to effect consummation of the transactions contemplated" by the agreement, including the Penn-Central merger itself (§ 30.4, R. 1469), but also prevents the Trustees, with narrow exceptions, from taking any position in any proceeding relating to the Penn-Central merger. In the excepted areas, the Trustees' position: "shall not be inconsistent with the provisions and intent" of the agreement (§ 11.7, R. 1455).

Before the Trustees entered into this agreement with Penn and Central, the Trustees opposed consummation of the merger before actual inclusion of New Haven. Because of the agreement, as part of the bargain with Penn and Central, the Trustees withdrew their opposition to prior consummation (Tr. 85-86, 89-90, oral argument of Nov. 15, 1966, *Gruss, et al.* v. *United States*, 66 Civ. 3413, 3425 (S.D. N.Y., decided, Nov. 28, 1966)).

Although the New Haven goes to great lengths in an effort to explain away this aspect of the opinion of the district court (NH Brief, pp. 41-46), the fact remains that the district court held that the New Haven problem did not support the Commission's decision. Nor could it properly have done so because there is no substantial basis for the contention that immediate consummation is urgent because the merger may fall apart before New Haven can actually be included in a merged Penn-Central or the place of the other railroads can be determined (ICC Brief, pp. 54-55, 73; P-C Brief, p. 62; NH Brief, pp. 39-46).

This supposed danger that the merger will fall apart is a scare tactic. The ultimate annual savings of at least $80 million alone provide quite enough glue to keep the parties stuck together until consummation.[38] If the merger benefits are so fragile that Penn and Central would prefer to go their separate ways rather than await a solution of the problems their merger creates for competitive rail service in the East, the benefits of the merger cannot be nearly as great as the Commission has been led to suppose.

Counsel for the Commission and for the New Haven ask this Court to believe that Penn-Central is in danger of falling apart because the stock exchange ratio agreed upon by those railroads in 1962 might become out of line (ICC Brief,

---

[38] The 1966 proxy statement cited by counsel for the Commission (ICC Brief, p. 55) stated the reason management recommended the merger as follows: "The consummation of our merger with the Pennsylvania Railroad offers, we believe, the prospect of substantial savings and improved earnings."

At the July 21, 1966, meeting at which Central stockholders again approved the merger, a stockholder asked why Central was still interested in merger now that its own earnings were restored, and the Central President is reported as saying: "Mrs. Soss, an $81 million saving looks good to me yet" (N.Y. Times, July 22, 1966, p. 39).

pp. 54-55; NH Brief, p. 42). Significantly, counsel for Penn and Central do not join in this argument and there is nothing in the Penn-Central merger agreement which would permit either party to walk away from the merger because of dissatisfaction with the financial terms.[39]

The table of earnings data set forth by Commission counsel is completely misleading because it does not show the earnings per share of the stock being exchanged.[40] When

---

[39] The N&W-Wabash situation relied upon by New Haven counsel (NH Brief, pp. 15-16) was very different because of a specific time limit included in the agreement at the insistence of Penn, which controlled both N&W and Wabash (324 I.C.C. at 17) (See pp. 44-45, *infra*).

[40] This table (ICC Brief, p. 55) deals with the earnings per share of railroad companies which form only a part of the total Penn and Central corporate enterprises whose stock is covered by the exchange ratio. The consolidated earnings per share related to the shares covered by the exchange ratio were set forth in the same proxy statement relied upon by Commission counsel; they are as follows:

	Actual earnings per share		*Pro forma for merged company*	
	PRR	*NYC*	*1 share*	*1.3 shares*
1962	$1.53	$0.03	$0.94	$1.22
1963	2.35	2.11	2.07	2.69
1964	4.37	5.34	4.27	5.55
1965	5.06	7.64	5.38	6.99

The exchange ratio of 1.3 shares of Central for one share of Penn stock agreed upon in 1962 obviously anticipated an improvement in Central earnings, which has occurred. The ratio of earnings per share has closely bracketed the 1.3 relationship in recent years, and since both Penn and Central are reporting increased earnings for 1966, there is no basis for any suggestion that the exchange ratios are in any danger of getting out of line.

New Haven Trustee Richard Joyce Smith stated in his affidavit before the district court (R. 688):

> "During the four years which have elapsed since hearings on the merger first commenced before the Commission, the proposed ratio of exchange of NYC stock for PRR stock under the merger agreement has apparently remained in a relationship which has not caused any question as to whether the merger remained fair."

properly analyzed, the exchange ratio is still eminently fair. The Penn and Central stockholders demonstrated this by voting overwhelmingly in July 1966, in light of the very earnings data relied upon here, to reaffirm the merger as conditioned by the Commission's April 6th report.[41] And, as Commission counsel concede, "there are many other factors involved" in an exchange ratio besides the per share earnings (ICC Brief, p. 55).

The notion that the merger may come apart was not even mentioned by Penn's Board Chairman Stuart T. Saunders in his affidavit filed in the court below (R. 197-201). The fear that Penn-Central runs a "risk of its being prevented by some untoward development" was raised by the New Haven Trustees but rejected by the court below as insubstantial (J.S., App. A, pp. 21-22).

This theory is not supported by any evidence in the record before the Commission at the time it issued its report of September 16th. The point was first raised by Penn on November 16, 1966, when Mr. Stuart T. Saunders was subpoenaed as a hostile witness during the Commission hearings on the question of capital indemnity. No reliance whatever was placed upon any threat to the financial terms of the merger agreement; the only reasons cited by Mr. Saun-

---

[41] The July 21, 1966, vote of Central stockholders was 87.4% for the merger, 0.1% opposed, and 12.5% not voting. On the same day, the vote of Penn stockholders was 87.9% for the merger, 0.2% opposed, and 11.9% not voting. Thus, of the stockholders voting on the merger, the vote in favor of the merger was 99.9% for Central and 99.8% for Penn.

Any notion that stockholders might be getting restive over delay was dispelled by the statement of Penn's Board Chairman that this "overwhelming majority" constituted "an even larger majority than the approval of the merger plan given by stockholders in May, 1962." (Report to Penn stockholders, dated September 7, 1966.)

ders for his asserted fear that Penn-Central would not hold together was the uncertainty of personnel and the necessity of holding capital expenditures programs in suspense pending consummation of the merger.[42] N&W, relying upon its right to rebut and impeach this statement of a hostile witness,[43] offered to prove that there is no substance to Mr. Saunders' assertions, but the Commission closed the hearings without receiving this testimony. At a subsequent Commission hearing on the subject of the temporary traffic and indemnity conditions, N&W presented evidence in rebuttal of Mr. Saunders' assertion that the merger was in danger of coming apart, but the Examiner excluded the evidence.[44]

As matters now stand, the only evidence in any record in which Penn or Central has suggested that the merger is in danger of falling apart is Mr. Saunders' assertion of November 16, 1966, long after the Commission's report of September 16th which is the subject of this litigation. And N&W has thus far been denied any opportunity to rebut this assertion.

---

[42] Witness Saunders' testimony is set forth in Appendix C, attached hereto. In contrast, Penn's 1965 Report to Stockholders stated (p. 8): "In 1965, our capital improvement program amounted to $220 million, the highest for any railroad in the country and a substantial increase over the averages of recent years."

[43] Federal Rule of Civil Procedure 43(b), made applicable by the Commission's General Rule of Practice 1.75. See 5 MOORE, FEDERAL PRACTICE, ¶ 43.10 at p. 1348. The right "to submit rebuttal evidence" is also protected by the Administrative Procedure Act (5 U.S.C. § 1006(c)).

[44] Hearing of December 9, 1966, I.C.C. Finance Docket 21989, Tr. 21784. The testimony offered by N&W on this subject is set forth in Appendix D, attached hereto.

C. Penn and Central Seek Immediate Consummation of Their Merger to Achieve a Position of Dominance Over the Eastern Railroad Industry.

As stated in our opening brief (p. 25), whatever its ultimate desirability, "the Penn-Central merger cannot be found to be in the public interest unless and until the other railroads in the East can be so restructured or otherwise protected that their ability to compete against the huge Penn-Central system is assured." It is now apparent that the Commission's approach, permitting immediate consummation of Penn-Central subject to interim protective conditions which it hopes to fashion, creates far more problems and adverse effects upon the public interest than any benefits which Penn-Central can produce during the period in which the place of the other Eastern railroads is to be determined.

As previously discussed, appellees have not shown any benefits to the public or to themselves if the merger is consummated under restrictive conditions which would freeze Penn-Central's ability to make significant operating savings (pp. 33-36, *supra*). Under such restrictive, interim conditions, there is every likelihood that, as stated by counsel for Penn: "We [Penn and Central] are going to be worse off by merger."[45] This is likely because restrictive conditions would, by disabling Penn-Central from improving service in competition with E-L, D&H and B&M, render Penn-Central vulnerable to loss of traffic to motor carrier competition (see 327 I.C.C. at 514-515).

Why then are Penn and Central so anxious to consummate their merger notwithstanding the likelihood that, for

---

[45] December 5, 1966, hearings in I.C.C. Finance Docket 21989, Tr. 21311.

a period subject to the interim protective conditions, they will reap no significant benefit of increased efficiency and even stand to lose ground in competition with the trucks? The answer is that Penn and Central would gain, not from efficiencies, but from the elimination of competition between themselves and the domination that a Penn-Central merger would produce in the Eastern railroad market.

As shown in the statistics set forth in our opening brief (p. 4), Penn-Central would start with half of the railroad business in the East. Penn and Central attempt to minimize the significance of the size of the system which would be produced by their merger, asserting: "Gross operating revenues are no indication of financial strength or competitive power." (P.-C Brief, p. 4). This is nonsense. Under this theory, Penn-Central could obtain a monopoly of all competitive rail business in the East and, if N&W and C&O still earned a higher rate of return on their remaining traffic (which is not rail competitive at all), Penn and Central would still contend that garnering 100% of the competitive business was "no indication of competitive power."

This approach to the analysis of competitive power is fundamentally unsound and at variance both with established economic authority and with past decisions of this Court. In Kaysen and Turner, *Anti-Trust Policy? An Economic and Legal Analysis* (1959), for example, the authors state (p. 101):

> "Size as market share has an obvious relation to market power. In general, it can be said that a large market share, held either by a single firm or by a small number of firms acting jointly, is a necessary condition for the existence of substantial market power in a market."

And, as recognized by the Attorney General's National Committee to Study the Anti-Trust Laws (1955): "the

level of profit in a firm or an industry can reflect many forces other than the presence or absence of effective competition" (p. 324).[46] In its decisions in antitrust cases, this Court has consistently acted on the manifestly correct premise that the way to measure the effect of a merger on competition is to examine the shares of the market, not the profitability of the competitors.[47]

Moreover, the earnings statistics relied upon by counsel as "evidence of financial strength and competitive power" (P-C Brief, p. 4), also miss the point because they do not represent either the total earnings of the corporate entities involved or the earnings from competitive business. In 1965, Penn plus Central reported net income of $132 million, as compared to net income of $73.5 million for N&W and $62.7 million for C&O-B&O under generally accepted accounting principles.[48] These net income figures measure the financial strength of the respective companies before making adjustments to reflect the over $80 million annual reduction in expenses and resulting increase in earnings which would accrue to Penn-Central as a result of their merger.

To the extent net income affects competitive power, these figures properly reflect the entire net income of the competitors, including income derived from non-railroad operations and railroad operations which are not competitive. Analysis of relative earnings in the areas in which Penn and

---

[46] See also the testimony of Dr. Peck discussing these principles in I.C.C. Finance Docket 21989, Exhibit FH-42.

[47] In *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 272 (1966), involving a merger of retail grocery stores, this Court used retail sales as a measure of the market shares at issue. Merger was disapproved even though, as the dissenting opinion points out, one of the partners to the merger was experiencing declining profits (*id.* at pp. 297-98). See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343 (1962), where the market shares were measured according to the unit volume of shoe sales.

[48] I.C.C. Finance Docket 21989, Exhibit FH-17.

Central compete with N&W show that N&W's rate of return is not substantially different today from Penn or Central.[49] Thus, Penn-Central would admittedly start out with half of the Eastern railroad market, would be twice the size of any other railroad and would also, with merger savings, have over twice the earning power of any other railroad in the East.

Appellees suggest that N&W and C&O are somehow estopped from attempting to meet Penn-Central domination of the Eastern railroad market because a "three-system East" was generally contemplated and Penn and Central had contributed to the creation of the present N&W and C&O systems (NY Brief, pp. 3-4; ICC Brief, p. 8, n. 3; P-C Brief, pp. 21-22 and n. 12; NH Brief, pp. 14-16).

The plan for a three-system East, also known as the "Symes plan" after the Penn Board Chairman who presented it, is a plan for Penn-Central domination of the East. The unprotected carriers do not subscribe to any such "plan." These appellants were confronted with the choice of opposing Penn-Central (and thereby thwarting the efficiencies and service improvements which Penn-Central will offer) or attempting to devise their own plan under which the railroads outside Penn-Central could offer the same benefits to their own shippers and create a territory-wide system offering single-line service competitively balanced with Penn-Central. That N&W and C&O chose a constructive rather than obstructive course does not constitute any acquiescence in the "Symes plan" for a three-system East.

The so-called "contributions" which Penn and Central claim to have made to the present N&W and C&O systems were simply steps taken by Penn and Central to further the "Symes plan." Indeed, the present N&W is exactly what Penn willed it to be. Prior to the N&W unification

---

[49] I.C.C. Finance Docket 21989, Exhibits FH-41, pp. 5-10, and FH-46.

with Nickel Plate and Wabash, Penn owned over 30 percent of N&W's outstanding voting stock and had extensive representation on N&W's Board of Directors and Executive Committee (324 I.C.C. at 32-33).[50] On the basis of these facts, the Commission found that Penn controlled N&W (324 I.C.C. at 33). Under these circumstances, with Penn having control of N&W throughout the period of the hearings before the Commission in the Penn-Central case, there is no significance to the repeated references by appellees to N&W's position prior to consummation of the present N&W system in October 1964.[51]

In any event, it is plain that the Commission itself had, and still has, an obligation to consider the impact of Penn-Central upon other Eastern railroads and upon the public. Indeed, the Commission was acting pursuant to this responsibility when it recognized that Penn-Central is a unique transaction in that the very service benefits it will ultimately produce will destroy other Eastern railroads. The Commission so found (327 I.C.C. at 529, 532; J.S., App. B, p. 14). The Commission also found that "we would not authorize consummation at this time, even though approving the merger" unless the threatened carriers are

---

[50] The present Penn Board Chairman, Mr. Stuart T. Saunders, was President of N&W until 1963, when he succeeded Mr. Symes.

[51] Commission counsel state that "N&W-Nickel Plate consummated their merger and accepted this condition [Appendix O] with knowledge of the pending Penn-Central merger proceeding, and then deliberately refrained from presenting any evidence in that proceeding as to the competitive impact of the proposed merger upon their new system" (ICC Brief, p. 53). As the Commission found, N&W was controlled by Penn up to the date of consummation of the N&W-Nickel Plate merger in October 1964. Since the Penn-Central hearings closed in 1963 (with a brief reopening for a limited purpose in September 1964), the charge of Commission counsel that N&W "deliberately refrained from presenting any evidence in that proceeding" is chronologically wrong and inconsistent with the Commission's own finding of Penn control of N&W.

protected (327 I.C.C. at 532). The Commission further found that delay in consummation of two years or more would be required in the absence of effective protective conditions (327 I.C.C. at 563).

Since effective protective conditions have not been shown to be possible, the Commission should now go on with the task of determining the circumstances under which Penn-Central would be in the public interest. There is no reason to believe that the several alternative proceedings for the inclusion of the remaining Eastern railroads in a major system cannot be heard and determined by the Commission during such a period. The proceedings in which E-L, D&H and B&M seek inclusion in the present N&W system are already the subject of Commissioner Webb's recommended report. And, by order dated December 23, 1966, the Commission has reconsidered its prior refusal to set hearings and has set March 6, 1967, as the service date for evidence and April 17, 1967, as the date for hearings on the N&W-C&O proposal for restructuring the protected and unprotected carriers into a balanced competitor of Penn-Central.[52] In this situation, a postponement in the consummation of the Penn-Central merger is a necessary and a practical means toward assuring a rational disposition of the entire Eastern railroad problem.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment of the district court denying

---

[52] N&W and C&O have been seeking to obtain a hearing on their proposal since their merger application was filed on October 11, 1965. Penn and Central are the only railroads unqualifiedly opposed to the N&W-C&O proposal, and they opposed even a hearing on the question of whether such proposal is in the public interest (opening brief, pp. 47-48).

injunctive relief should be reversed and the cause remanded with directions to set aside the order of the Interstate Commerce Commission permitting immediate consummation of the Penn-Central merger.

Respectfully submitted,

GEORGE L. SAUNDERS, JR.
MILTON R. SCHROEDER
HOWARD J. TRIENENS
11 South LaSalle Street
Chicago, Illinois 60603
LLOYD N. CUTLER
900 17th Street N. W.
Washington, D. C. 20006
EDWARD K. WHEELER
Southern Building
Washington, D. C. 20006
Attorneys for Appellants

Of Counsel:

WILLIAM R. ALTHANS
ROBERT B. CLAYTOR
KENNETH H. EKIN
NORMAN C. MELVIN
WILLIAM P. QUINN
JOHN S. SHANNON.

SIDLEY, AUSTIN, BURGESS & SMITH
Chicago, Illinois
WILMER, CUTLER & PICKERING
Washington, D. C.
WHEELER & WHEELER
Washington, D.C.

January 6, 1967